APPEAL NO. 93314

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). On February 1, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer), presiding. The record was closed on February 11, 1993. The hearing officer determined that the appellant, claimant herein, did not sustain an injury in the course and scope of his employment on (date of injury). Claimant appealed, contending that, contrary to the hearing officer's findings, the medical evidence supported that he had sustained a compensable injury on (date of injury). Respondent, (DOT herein), responds that claimant's appeal is untimely or, in the alternative, that the decision is supported by the evidence and that the hearing officer's decision should be affirmed.

DECISION

We find that the appeal in this matter was not timely filed as required by Article 8308-6.41(a) and the decision of the hearing officer is the final administrative decision in this case. *See* Article 8308-6.34(h) of the 1989 Act.

The decision of the hearing officer was distributed, by mail, on March 23, 1993. Claimant, in his appeal, does not assert when the decision was received, therefore, the provisions of Texas Workers' Compensation Commission (Commission) Rule 102.5(h) (Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(h)) are invoked. Rule 102.5(h) provides:

> (h)For purposes of determining the date of receipt for those notices and other written communications which require action by a date specific after receipt, the commission shall deem the received date to be five days after the date mailed.

In that the decision was mailed on March 23, 1993, the "deemed" date of receipt is March 28, 1993. Article 8308-6.41(a) requires that an appeal shall be filed with the Appeals Panel "not later than the 15th day after the date on which the decision of the hearing officer is received. . . ." If the deemed receipt date is March 28, 1993, 15 days from that date would be Monday, April 12, 1993, which would be the statutory date by which an appeal must be filed. Claimant's appeal was dated, postmarked and certified as having been served on the opposing party on April 16, 1993. Consequently, the appeal was filed beyond the statutory 15 days accorded in Article 8308-6.41(a), using the date of April 16, 1993 as the date of mailing pursuant to Rule 143.3(c)(1). The appeal was received on April 21, 1993; therefore, the appeal also does not meet the requirement of Rule 143.3(c)(2) which provides the appeal must also be received within 20 days of the receipt of the hearing officer's decision. Parenthetically, we note that DOT's contention that the deemed rule begins when the hearing officer's decision "is rendered," is incorrect. The deemed date is computed from the date the decision is distributed in the mail (Rule 102.5(h)).

Article 8308-6.34(h) states that the decision of the hearing officer is final in the absence of a timely appeal. Determining the appeal was not timely filed, as set forth above, we have no jurisdiction to review the hearing officer's decision.

Although the appeal cannot be formally considered, it does not appear that this has resulted in depriving the claimant of relief to which he would otherwise be entitled. The record has been reviewed and the evidence supports the hearing officer's decision that the claimant did not sustain an injury which arose out of and in the course and scope of employment on (date of injury).

The record discloses that claimant was employed by DOT as a maintenance worker. In 1990 he sustained severe work-related injuries to his neck and back. Claimant returned to his job on August 8, 1991, with certain limitations imposed by his treating physician. Claimant contends that he was injured on (date of injury), when he was required to do excessive stooping and bending, in excess of the doctor's physical limits of claimant's employment, by painting hash marks on a highway. Claimant continued to work, with the exception of one day each for sick leave and vacation time, until March 17, 1992, when he brought in a work release slip. Claimant returned on March 19th and informed his supervisor that his complaints were work related.

The appealed issue is whether the medical evidence supports a (date of injury), injury to claimant's back. Claimant references the treating doctor's report, which states that claimant's ". . . reinjury (this may be classified as a new injury in insurance terminology) . . ." as proof of a new injury. However, as the hearing officer notes, ". . . there is very little evidence indicating the Claimant's symptoms are related to anything other than his 1990 accident." Although a report indicates claimant had a "decrease in strength chart curves," the EMG test on which that comment was based indicates "S-1 Radiculopathy" which the hearing officer found was consistent with claimant's "spina bifida occula" of S-1. A May 5, 1992, MRI of claimant's lumbar spine is characterized "Normal lumbar spine MRI." In short, the medical evidence at best is inconclusive or contradictory as to causation of claimant's present problems.

The hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given the evidence. Article 8308-6.34(e). When faced with conflicting statements, the hearing officer is free to believe one witness and disbelieve another and resolve inconsistencies and conflicts in the testimony. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. App.-Amarillo 1974, no writ). In reviewing a case, the Appeals Panel would be justified in reversing a case on a sufficiency of the evidence basis only if the determinations of the hearing officer were so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. We could not have so found in this

case, as the medical evidence, at best, was subject to differing interpretations and it was within the province of the hearing officer to make that determination.

In summary, the appeal was not timely filed, but even if it were, it appears that the evidence supports the hearing officer's decision finding, in essence, that claimant has not sustained his burden of proving that he sustained an injury in the course and scope of his employment on (date of injury).

Thomas A. Knapp
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Gary L. Kilgore
Appeals Judge